

Supreme Court of Canada Decision on Foreign Non- Monetary Orders

On November 17, 2006, the Supreme Court of Canada released its decision in *Pro Swing Inc. v. Elta Golf Inc.* (available [here](#)). It had been eleven months since the court reserved its decision. At issue was whether the Ontario court should recognize and enforce a consent decree and a contempt order made by the United States District Court for the Northern District of Ohio (Eastern Division). At first instance the Ontario Superior Court of Justice had enforced the decree and order, but on appeal the Court of Appeal for Ontario had refused to do so.

The central issue in the case was whether the Canadian common law rule requiring a foreign decision to be for a fixed sum of money before it could be enforced would evolve to encompass non-monetary orders. On this issue all seven justices agreed that the time had come to change the rule so that non-monetary orders could be enforced.

However, the court divided 4-3 on whether this particular decree and order should be enforced, with a majority affirming the Court of Appeal for Ontario's negative answer. Justice Deschamps set out several reasons for the refusal, including that: (a) the contempt order was quasi-criminal in nature and so violated the rule on not enforcing foreign penal law; (b) the wording of the consent order was unclear; and (c) other judicial assistance mechanisms (particularly letters rogatory) were a more appropriate way of assisting the Ohio proceedings.

The dissent would have restored the first-instance decision and allowed enforcement. Chief Justice McLachlin held that civil contempt orders were not penal in nature and that the

wording of the consent order was sufficiently clear.

The court refers to several issues which are left unresolved. What test will apply to whether a particular foreign non-monetary order is enforceable? Will new or expanded defences to enforcement be necessary to address the greater complexity involved in equitable orders? Does the requirement that the order be final require reconsideration outside the traditional scope of monetary orders? These issues will need to be worked out in subsequent cases.